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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1971

No. 70-117

CHARLES JOSEPH KASTIGAR, *Petitioner*

vs.

UNITED STATES OF AMERICA, *Respondent*

MICHAEL GOREAN STEWART, *Petitioner*

vs.

UNITED STATES OF AMERICA, *Respondent*

BRIEF OF THE NATIONAL LAWYERS GUILD AS AMICUS CURIAE ON BEHALF OF PETITIONERS

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THE INTEREST OF AMICUS CURIAE

The National Lawyers Guild is a national bar association organized in 1937 and dedicated since its inception to defense of the Bill of Rights. This brief amicus curiae on behalf of petitioners reflects the

Guild's conviction that the compulsory testimony provisions in Title II of the Organized Crime Control Act of 1970 pose an historic threat to liberties embodied in the Fifth Amendment clause that "No person . . . shall be compelled in any criminal case to be a witness against himself."

ARGUMENT

I. THE IMMUNITY PROVISIONS IN TITLE II OF THE ORGANIZED CRIME CONTROL ACT OF 1970 DANGEROUSLY BLUR THE CONSTITUTIONAL SEPARATION OF POWERS.

A. The Legislative History Shows That Title II is Intended to Grant Unprecedented Arbitrary Powers to the Executive Branch.

The immunity provisions in Title II of the Organized Crime Control Act of 1970[1] headed the list of organized crime legislation sponsored by the Attorney General during the 91st Congress. Witness immunity was the first of the "new weapons and tools" requested by the Attorney General, on which President Nixon, in a special message to Congress, "relative to the fight against organized crime," urged Congress to act "swiftly and favorably."[2]

The President took special pains to "commend to the Congress for its consideration" the recommenda-

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[1]Pub. L. 91-452, Title II, Oct. 15, 1970, 84 Stat. 926, 18 U.S.C. §§ 6001 et seq.

[2]Message from the President of the United States, "Relative to the Fight Against Organized Crime," April 23, 1969. Reprinted in *Hearings* on S. 30 and other measures, Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary, 91st Cong., 1st Sess. (1969), at pp. 444 et seq., p. 448.

tions on witness immunity of the National Commission on Reform of Federal Criminal Laws. And the Commission's draft immunity bill was incorporated by Congress into the Organized Crime Control Act without significant modification.[3]

The Commission, however, relied entirely on the analysis of immunity prepared by its consultant, Professor Robert G. Dixon, Jr. A close review of the legislative history of Title II reveals that Congress was persuaded to its adoption under the strenuous lobbying of the Department of Justice, which based its position on Professor Dixon's analysis.[4]

Professor Dixon's contention, hammered home by the Justice Department witnesses, is that the scope of

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[3]The Commission's draft bill is set forth in Hearings on S. 30, *supra*, n. 2, at pp. 289-90.

[4]The Commission's report is contained in identical letters dated March 17, 1969, to President Nixon and House Speaker McCormack.

Commission Document No. 33, prepared by Professor Dixon, is appended to each letter and constitutes the bulk of the Commission's material submitted to the President and to Congress.

The Commission's letter report to the House Speaker is set forth in *Hearings* on H. R. 11157 and 12041, before Subcomm. No. 3 of the House Comm. on the Judiciary, 91st Cong., 1st Sess., Ser. 14, pp. 36-38. (1969)

The letter report to the President is set forth in *Hearings* on S. 30, at pp. 287-9, *supra*, n. 2.

The complete text of Commission Document No. 33 is set forth in the *Hearings* on S. 30, pp. 290-321.

In addition, Professor Dixon testified extensively in support of the Commission's draft bill on immunity before the Judiciary Committees of both houses: *Hearings* on H. R. 11157, at pp. 55 et seq.; *Hearings* on S. 30 at pp. 279 et seq.

The testimony of Attorney General Mitchell and other representatives of the Justice Department appears in the House Judiciary Committee hearings referred to, beginning at p. 39, and in the Senate Judiciary Committee hearings referred to, beginning at pp. 107 and 388. The written comments of the Department of Justice appear in the Senate hearings, beginning at p. 369.

statutory immunity conferred on a witness who invokes his Fifth Amendment privilege—as a quid pro quo for compelling testimony on pain of contempt—need be no broader than the "immunity" judicially created in non-statutory situations. The legislative history reflects only shallow inquiry by Congress into the implications of Title II and perfunctory analysis of the authority mustered in support of the Dixon thesis.[5]

The purpose and effect of Title II, when coupled with the sanctions for recalcitrant witnesses in Title III of the Act, are to confer unprecedented power on the Attorney General to deprive citizens of their right to remain silent. The statute contemplates no judicially administrable standards for exercise of this pernicious authority. Indeed, Professor Dixon argues that the nature of the power itself precludes a judicial role.[6]

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[5]See H. R. Rep. No. 91-1549, 91st Cong., 1st Sess. (1970), set out in *U.S. Code Cong. & Ad. News*, pp. 4705, 4715.

[6]"* * * Grants of immunity * * * are the product of a calculation by the immunity granting agency that its need for the information overrides the public interest in prosecuting those witnesses whose conduct has made them possible defendants in a possible proceeding.

"This is a 'law enforcement bargain situation'—a naked policy judgment—in regard to which the courts have no legal standards for judgment * * *." *Hearings* on S. 30 at p. 294, *supra*, n. 2.

"Indeed," Professor Dixon continues, "a court or judge, once in the immunity picture, may naturally be disposed to find a 'meaningful' role by ballooning a petty, and even demeaning, procedural role into a pseudo-procedural substantive-oriented review of the public need for a particular grant in question. That this is a real possibility is intimated by some of the lines in the opinion of Judge J. Skelly Wright in *In re Bart* [304 F.2d 631 (D.C. Cir., 1962)], *supra*." *Hearings* on S. 30 at p. 301.

"By definition, a court, with no panoramic vision of total federal law enforcement planning and accomplishment, will lack the

Fundamentally Title II of the Organized Crime Control Act sanctions another exercise of broad executive powers, assumed by the present Attorney General in other contexts. These have been urged recently in the asserted inherent authority of the executive branch to override long established freedoms of the press under the vague rubric of "national security."[7] And the Justice Department equally seeks to disembowel the Fourth Amendment protection against unreasonable searches and seizures with the sprawling invention of an executive right to tap wires without a warrant in domestic "national security" cases.[8] Together, these measures reveal a menacing, and illegal, concentration of power in the Executive.

Unlike the sweeping powers sought by the Justice Department in the cited First and Fourth Amendment areas, however, the grant of executive power in

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needed perspective for an informed decision." *Hearings* on S. 30 at p. 312.

Professor Dixon concludes that participation of a federal district judge in the compulsory testimony proceedings under immunity statutes has been and should continue to be a "weak and paltry thing—ministerial, not discretionary in nature." *Hearings* on S. 30, at p. 316.

[7]The existence of this power was forcefully urged on this Court by the government in *New York Times Co. v. United States*, 39 U.S.L.W. 4879 (June 30, 1971).

[8]That the government ought to be free of judicial scrutiny in electronic surveillance and wiretapping of "domestic subversives" is urged on this Court in *United States v. United States District Court, et al.*, No. 71-1105 (6th Cir., filed April 8, 1971), *cert. granted*, 39 U.S.L.W. 3556 (June 21, 1971).

See also *United States v. Smith*, 321 F. Supp. 424 (C.D. Cal., 1971), petition for writ of mandamus pending in *United States v. United States District Court, et al.*, 9th Cir., No. 71-1378.

And see *United States v. United States District Court, et al.* (on petition for writ of mandamus to the District Court for the Northern District of California), 9th Cir., No. 71-1882, pending.

the Fifth Amendment context has been seduced from the Congress by the Justice Department and is now crystallized in statute.

If the statute is allowed to stand, it will be a repudiation of the fundamental meaning of the Fifth Amendment. As Mr. Justice Frankfurter said in the Court's opinion in *Ullmann v. United States,* 350 U.S. 422, 426 (1956), the privilege "registers an important advance in the development of our liberty—'one of the great landmarks in man's struggle to make himself civilized.'" And the Solicitor General, Erwin N. Griswold, in his famous series of addresses provoked by congressional abuses of the privilege during the McCarthy investigations, re-affirmed the privilege as an ancient shield between the citizen and the state:

> One of the functions of government, based on long experience, is at times to protect the citizen against the government. This function has been performed, to some extent, by the Fifth Amendment, although not always perfectly, and not always without some loss to legitimate government interests. While protecting the citizen against the government, the Fifth Amendment has been a firm reminder of the importance of the individual.
>
> * * * [T]he Fifth Amendment can serve as a constant reminder of the high standards set by the Founding Fathers, based on their experience with tyranny. It is an ever-present reminder of our belief in the importance of the individual, a symbol of our highest affirmations * * *[9]

[9]Griswold, "The Fifth Amendment Today," Harvard University Press, Cambridge, 1955, at p. 81.

B. Historical Experience With Immunity Statutes Affords No Assurance Against Abuse of Title II to Suppress Unpopular Political Ideas.

The Fifth Amendment privilege attracted wide public attention during the early 1950's as a result of flagrant abuses of investigatory powers by congressional committees. Title II of the Organized Crime Control Act of 1970 promises a renewal of those abuses, but it shifts the forum from the committee rooms of Congress to grand juries across the country. Two *sui generis* ingredients of the statute suggest this result.

(1) The Unlimited Subject Matter For Which Title II May Be Employed.

Before 1970 compulsory testimony statutes, with two exceptions, were restricted to offenses connected with economic regulation.[10] Since the object of investigation into such offenses was usually a corporate offender to which the privilege against self-incrimination did not extend, the potential for widespread abuse of immunity was slim.

In 1954 Congress was still uneasy over the concept of compulsory testimony. When it enacted the first such provision outside the area of economic regulation (18 U.S.C. § 3486(c)), it continued to limit the subject matter to which the statute applied. The con-

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[10] "Until recent years the United States Attorneys and the Department of Justice did not have immunity statutes supportive of their general criminal law enforcement function, apart from their role in enforcing the 'criminal kickers' attached to various economic regulation statutes." *Hearings* on S. 30, at p. 296; see also Appendix A, "Existing Immunity Statutes," at p. 319.

stitutionality of this section was upheld in *Ullmann v. United States,* 350 U.S. 422 (1956).[11]

Congress, however, threw caution to the winds in Title II by removing any such restrictions[12] and substituting the shapeless requirement that the compelled testimony need only be "in the public interest," if so asserted by a United States Attorney, with the approval of the Attorney General or certain of his subordinates. Significantly, "organized crime" is nowhere defined in the Act.

Thus until now the country has had no experience with compulsory testimony legislation which may be applied broadly to "deviations from prevalent beliefs, thoughts, opinions, associations, and utterances—the fields protected by the Fifth Amendment." Rogge, Compelling the Testimony of Political Deviants, 55 Mich. L. Rev. 375, 383 (1957).

But that Title II will be given such application is already suggested by the efforts of the present Attorney General to expand the permissible subjects of compulsory testimony beyond the scope envisioned by Congress in the immunity provisions of the Omnibus Crime Control and Safe Streets Act of 1968. (18

[11]The close control of subject matter by Congress in § 3486(c) was one of the factors relied upon by the court in *Ullmann* for upholding the section against attack on the grounds that it infringed upon state interests. 350 U.S. at 435-36. See also *In re Bart,* 304 F.2d 631 (D.C. Cir., 1962).

[12]Following the *Ullmann* decision Congress added transactional immunity provisions to the Narcotics Control Act in 1956 (18 U.S.C. § 1406), the Consumer Protection Act of 1968 (18 U.S.C. § 895), and the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. §§ 2514, 2516). But these provisions continued the historic practice of specifying the offenses to which they were applicable.

U.S.C. §§ 2514, 2516.) *Carter v. United States,* 417 F. 2d 384 (9th Cir., 1969).

(2) The Prospective Immunity Provisions of Title II.

Title II contains unprecedented authorization for prospective compulsory testimony applications in grand jury, congressional, and administrative proceedings. Application by the United States attorney may be made without notice to the witness, if it appears that the witness "is likely to refuse to testify." This provision is framed in mandatory terms with respect to the powers of the district court to which application is made.

Freedoms of association and speech, as well as an interest in a zone of personal privacy, ordinarily immune from government intrusion, are related to the Fifth Amendment privilege, even though they may not be incorporated in it. (See e.g., *Ullmann v. United States, supra,* fn. 6, 350 U.S. at 430).

There can be no doubt that the omnipresent spectre of a federal district court order to testify or produce any evidence that a United States attorney believes "may be necessary to the public interest" will have the chilling effect of a deep freeze on the exercise of these personal rights by persons whose political views are deemed dangerous or distasteful to the government.[13]

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[13]Such prospective orders also run counter to the policies of Rule 24, Federal Rules of Civil Procedure, respecting intervention of right. Indeed, that Congress had such an illegitimate purpose in providing for prospective immunity is indicated by the express intent to overrule *In re McElrath,* 248 F.2d 612 *en banc* (1957). (See H. R. Rep. No. 91-1549, *supra,* 1970 *U.S. Code Cong. & Ad. News,* at p. 4719.)

II. TITLE II OF THE ORGANIZED CRIME CONTROL ACT IS FOUNDED ON A SERIOUS MISCONSTRUCTION OF THIS COURT'S RECENT DECISIONS EXPANDING THE PROTECTION OF THE PRIVILEGE AGAINST SELF-INCRIMINATION.

At the heart of the Dixon-Justice Department argument laid before Congress lies confusion between a constitutional remedy and a constitutional principle. The premise behind Title II is that decisions of this Court, forbidding use of evidence obtained directly or indirectly by illegal government coercion, establish a form of judicial immunity equivalent in all respects to the statutory immunity in Title II.

The fatal error in this proposition is that it distorts the settled constitutional requirement that statutory immunity must be "coextensive with the privilege," *Counselman v. Hitchcock*, 142 U.S. 547, 586 (1892); *Brown v. Walker*, 161 U.S. 591 (1896); *Glickstein v. United States*, 222 U.S. 139, 141 (1911); *Murphy v. Waterfront Commission*, 378 U.S. 52, 54 (1964); *Malloy v. Hogan*, 378 U.S. 1 (1964), into the proposition that formal immunity need only be coextensive with the judicial *remedy* for violation of the privilege.[14] The remedy and the privilege are not coextensive.

This fallacy derives from an erroneous reading of decisions by this court dealing with confessions

[14]The values served by the exclusionary rule of evidence, applied in cases of unlawful search and seizure and illegal confessions, of course go beyond affording a remedy to one whose constitutional rights have been violated. But remedial purposes are an important part of the rule's rationale. See *Mapp v. Ohio*, 367 U.S. 643, 652 (1961), overruling *Wolf v. State of Colorado*, 338 U.S. 25 (1949).

coerced by police misconduct, civil penalties imposed as a price for assertion of the privilege, and certain registration statutes.

The coerced confession cases are exemplified by *Miranda v. State of Arizona,* 384 U.S. 436 (1966), holding that when the interrogation practices set forth in that decision are not adhered to, there is a strong presumption of violation of the privilege against self-incrimination. If the state is unable to meet the "heavy burden" of that presumption, all custodial statements must be excluded from evidence used at trial.

The scope of exclusion—"immunity"—however, has been fixed since this Court's landmark Fourth Amendment decisions in *Boyd v. United States,* 116 U.S. 616 (1885), and *Weeks v. United States,* 232 U.S. 383 (1914). The applicability, not the scope of the remedy was the issue in *Miranda.* Thus only a disingenuous interpretation of *Miranda* supports Professor Dixon's suggestion that "Use restriction has emerged as the central theme of the Fifth Amendment, analogous to the case development under the Fourth Amendment."[15]

The proponents of use-immunity also seek comfort in a second group of cases, concerning the use of evidence coerced by threats of civil penalties, particularly *Garrity v. New Jersey,* 385 U.S. 493 (1967), *Spevack v. Klein,* 385 U.S. 511 (1967), and *Gardner v. Broderick,* 392 U.S. 273 (1968). *Garrity* bars use

[15]*Hearings* on S. 30, at p. 305, *supra,* n. 2.

in criminal prosecutions of testimony derived from "waiver" of the privilege under the threat of loss of employment. *Spevack* precludes disbarment of an attorney for having invoked his privilege in a noncriminal investigatory proceeding. And *Gardner* holds that a police officer may not constitutionally suffer the penalty of dismissal from employment merely for relying on his privilege during an official investigation.[16]

The essence of these decisions is that the privilege bars compulsion of testimony by threat of civil penalties. The issue—as in *Miranda* and related confession cases—concerns the circumstances in which testimonial evidence will be deemed to arise from the government's exercise of coercive power rather than the declarant's exercise "of free choice to speak out or remain silent." *Garrity v. New Jersey, supra,* 385 U.S. at p. 497.

Thirdly, the recent gambling tax and gun registration cases, *Marchetti v. United States,* 390 U.S. 39 (1968), *Grosso v. United States,* 390 U.S. 62 (1968), and *Haynes v. United States,* 390 U.S. 85 (1968), are said to reaffirm that "use-restriction is the essential requirement imposed by the Fifth Amendment and hence the proper test of a valid immunity statute."[17]

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[16]The Dixon analysis carefully minimizes Mr. Justice Douglas' statement for the court in *Stevens v. Marks,* 383 U.S. 236, 244-45, a case closely touching the issue raised in other civil penalty cases, that the court need not decide the scope of immunity required in civil penalty cases, and completely ignores Mr. Justice Harlan's intimation in his concurring opinion that the transactional immunity of *Counselman* is required. *Hearings* on S. 30 at p. 307, *supra,* n. 2.

[17]*Hearings* on S. 30 at p. 307, *supra,* n. 2.

The purpose of the statutes disapproved in those cases was "to coerce evidence from persons engaged in illegal activities for use in their prosecution." 390 U.S. at 74, Brennan, J., concurring. And Mr. Justice Harlan's opinion for the Court makes clear that voluntariness is the touchstone of the privilege against self-incrimination:

> We cannot agree that the constitutional privilege is meaningfully waived merely because those "inherently suspect of criminal activities" have been commanded either to cease wagering or to provide information incriminating to themselves, and have ultimately elected to do neither. 390 U.S. at 52.

The thrust of the coerced confession, civil penalty, and registration cases is that the Fifth Amendment forbids testimonial compulsion. The means employed by this Court to enforce the prohibition must vary to meet the challenge of new and subtle forms of compulsion in widely divergent circumstances. But aside from the anomaly of conjuring a narrowing of the privilege out of these decisions which expand it, Congress committed a grave and illogical error when it accepted the Dixon thesis that the remedies judicially constructed to defend the privilege mark the limit to which Congress must go when it seeks to erase the privilege by statute.

III. THE PRIVILEGE AGAINST SELF-INCRIMINATION FORBIDS CONGRESS TO COMPEL TESTIMONY, REGARDLESS OF THE SCOPE OF IMMUNITY PROMISED THE WITNESS.

A. The Letter and Spirit of the Fifth Amendment Deny Congress the Power to Compel Testimony Over Objection of the Privilege Against Self-Incrimination.

Differences in the nature of testimonial evidence, as opposed to real evidence, have obscured the fundamental invalidity of all immunity legislation. The obscurity arises from the different ways in which a voluntary waiver is manifested.

The act of testifying voluntarily itself constitutes waiver of the privilege not to testify. The waiver is subjective. This characteristic helps to explain the exceptional safeguards against inadvertent waiver set forth in *Miranda*. The privilege differs in this important respect from the Fourth Amendment right to be free from unreasonable searches and seizures, where an affirmative act, such as consent to police entry, is necessary for a finding of waiver and the invasion of the constitutional privilege is an objective occurrence.

But of course the two rights are of equivalent constitutional stature, enjoy equivalent procedural protection, and may even coalesce in particular circumstances. *Boyd v. United States,* 116 U.S. 616, *supra.*

The flaw in traditional analysis of immunity statutes may be illustrated by an analogy to Fourth Amendment protections. If Congress attempted a search and seizure "immunity" statute—providing that the police could make unreasonable searches and seizures but would be barred from use of the seized

evidence (use-immunity) or from prosecuting for any transaction, matter or thing revealed by the search (transactional immunity)—would this Court uphold it on any theory?

It is inconceivable that the Court which found in the Bill of Rights the penumbral right of privacy affirmed in *Griswold v. Connecticut,* 381 U.S. 479 (1965) and which recently reminded law enforcement authorities that the Fourth Amendment "protects people" from invasions of their privacy, *Katz v. United States,* 389 U.S. 347, 351 (1967), would sanction warrantless breaking and entering private houses, free rummaging in private papers, unrestrained electronic surveillance of private conversations, unlimited police power to detain and frisk citizens on the street, and all of the other invasions of privacy of which zealous police are capable—so long as the victims enjoyed "immunity," regardless of its scope.

Yet this is precisely what immunity statutes do. Indeed, they go further. They permit prosecutors to probe into the innermost secrets of the witness, into his political opinions, his associations and indiscretions. They foster theft of his conscience itself by forcing him to inform on others.[18] These are the

[18]As Dalton Trumbo, himself a victim of the early Cold War inquisitions directed at heretical thought in the film industry, has recently written:

> In each historical crisis the informer has always sprung up as a bondservant of tyranny. Gibbon devotes pages to denunciation of "that reptilian tribe" as they corrupted Roman society and prepared the way for absolutism. The Reformation swarmed with them. Puritan New England, as it sank into despotism, gave them free rein. Every American slaveholder solicited informers among his slaves and found

"really ugly dangers which might transform our whole system of free government," against which Dean Griswold warned.[19]

The analogy to Fourth Amendment protections highlights the fact that no immunity, no matter how broad its scope, is coextensive with the right to remain silent. As Justice Blatchford said in *Counselman v. Hitchcock, supra,* 142 U.S. at 565:

> It would be quite another thing if the constitution had provided that no person shall be compelled in any criminal case to be a witness against himself, unless it should be provided by statute that criminating evidence extracted from a witness against his will should not be used against him. But a mere act of congress cannot amend the constitution even if it should ingraft thereon such a proviso.

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them, and rewarded them (for the mark of the informer is always his reward). They fed like lice upon the prostrate body of the French Revolution, and Napoleon freely acknowledged his indebtedness to them and to Fouché. As the Russian Revolution succumbed to dictatorship the informer throve because he was necessary to the suppression of human liberty. China was governed by informers until she rose up and threw them out, and the Hungarian people wrought their most horrible revenge upon the informer and his master, the secret police.

The more I think on it the more it appears to me that the curse upon the informer which characterizes all religions and all philosophies lies at the very heart of the social compact: that without it there can be no decent relationship anywhere for anybody: that informing as a crime is worse than murder or rape, since the murderer and the rapist harm only specific victims while the informer poisons and destroys the spiritual life of whole peoples. Trumbo, "Additional Dialogue," Evans & Co., New York, 1970.

[19]Griswold, *supra,* n. 9, at p. 75.

B. Clearly, the Use-Immunity of Title II is Inadequate to Supplant the Privilege.

The salient feature of Title II of the Organized Crime Control Act is not immunity but compulsion. Indeed, even if Professor Dixon is correct that this Court's decisions point to use-restriction as the judicial remedy, constitutionally required in compulsory testimony situations, it follows that the immunity provisions of Title II grant the witness nothing to which he is not already entitled. The immunity elements of the statute are a nullity. And only the provisions for compulsion by contempt in Title III constitute new matter.[20]

It follows that to label statutes such as those enacted in Title II as "immunity acts" is a misnomer. They are compulsory testimony provisions and nothing more. Their purpose is to put such a heavy price on exercise of the privilege that the witness will

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[20]This conclusion is buttressed by the Court's holding in *Adams v. Maryland*, 347 U.S. 179 (1954), involving an "automatic" use-immunity statute. (See also *United States v. Monia*, 317 U.S. 424 (1943).) Mr. Justice Black, writing for a unanimous Court in *Adams*, pointed out that the only effect of the "automatic" feature of the statute (conferring immunity even when the witness has not invoked his privilege), was to remove the requirement for prior invocation:

> "It is true that Adams did not attempt to escape answering these questions by claiming a constitutional privilege to refuse to incriminate himself. But no language of the Act requires such a claim in order for a witness to feel secure that his testimony will not be used to convict him of crime. *Indeed a witness does not need any statute to protect him from the use of self-incriminating testimony he is compelled to give over his objection. The Fifth Amendment takes care of that without a statute. Consequently, the construction of §3486 here urged would limit its protection to that already afforded by the Fifth Amendment with no effect whatever.* * * *" 347 U.S. at 181. Italics added.

relinquish it. He can hardly be said to waive it. And in exchange for his forced relinquishment, Congress grants the witness nothing more than this Court has said he is entitled to if a confession is beaten out of him by the police.

The inevitable conclusion (which will not escape those citizens who are most skeptical of the viability of our institutions) is that what the constitution says a policeman may not do by torture, unconscionable threats, or even inadvertence, Congress has said a United States Attorney may now do with a district court order in his hand.

CONCLUSION

Title II of the Organized Crime Control Act of 1970 invites the government to nullify by indirection constitutional rights which it could not touch directly. It is no hyperbole to say that sanctioning such procedures can only reduce fundamental safeguards to "impotent and lifeless formulas." *Weems v. United States,* 217 U.S. 349 (1910).

The Act announces Congress' belief that democratic institutions must be abandoned in perilous times. Near dictatorial powers are granted the executive, while the courts are reduced to a "paltry," "ministerial" role. And that provision of the Bill of Rights which Dean Griswold eloquently characterized as "a symbol of our moral striving, of our sense of the essential importance and dignity of the individual," is surrendered to the fleeting apprehensions of the state.

> Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficial. . . . The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning, but without understanding. *Olmstead v. United States,* 277 U.S. 438, 485 (1928), Brandeis, J., dissenting.

This Court, in its historic role as guardian of the constitution, should not hesitate to reverse petitioners' convictions and strike down Title II in its entirety—as violative at once of the constitutional cornerstone of separation of powers, and of the constitution's priceless Fifth Amendment.

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Respectfully submitted,

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